

STATEMENT OF THE CASE

ISSUES

Claimant argues the ALJ erred in finding she suffered a 5 percent preexisting impairment to her cervical spine. She contends she should be entitled to an impairment to the body as a whole rather than based on the schedule. Claimant further argues Dr. Murati's rating opinions are more credible than those of Dr. Carabetta because, unlike Dr. Carabetta, Dr. Murati had the operative report on claimant's shoulder surgery.

Respondent contends the record shows claimant had a 5 percent preexisting impairment to her cervical spine for which she had been compensated in a previous workers compensation claim, and both Drs. Murati and Carabetta agreed if claimant had a previous 5 percent impairment to the neck, she would have no new impairment as a result of her current accident. Respondent further argues it was claimant's attorney's responsibility to provide Dr. Carabetta with the operative report from claimant's surgery. Regardless, respondent contends Dr. Carabetta had sufficient information to provide a credible rating.

The issues for the Board's review are:

- (1) What is the nature and extent of claimant's disability?
- (2) Should claimant's objection to respondent's Regular Hearing Respondent's Exhibit 2 be sustained?
- (3) Did the ALJ err in reducing claimant's award by 5 percent impairment to the body as a whole for her preexisting cervical spine impairment?

FINDINGS OF FACT

Claimant has been employed by respondent for about 13 years, where she performs repetitive duties. She filed an Application for Hearing on March 13, 2008, claiming a series of injuries "all days worked until November 26, 2006." She claimed injuries to her neck, right hand and right shoulder from "[r]epetitive work that required moving and cutting cow intestines."¹ She speaks very little English and an interpreter was used to translate when she testified at the regular hearing. At the regular hearing, claimant added a beginning date to the series of accidents of January 6, 2005. Respondent objected to this amendment to the alleged date of accident but admitted "to the accident on 11-26-06 and following."² In the Award, the ALJ found an accident occurred on November 26, 2006, that arose out of and in the course of her employment with respondent, and that has not been

¹ Form K-WC E-1, Application for Hearing filed March 13, 2008.

² R.H. Trans. at 7.

made an issue in this appeal to the Board. At the regular hearing, claimant also testified that she had a subsequent accident in October 2010 to her left hand, which is not a part of this docketed claim.

After reporting her injury to respondent, claimant received extensive treatment that included carpal tunnel release surgery on the right; right trigger finger release, for which a revision was later necessary; and arthroscopy for the right shoulder due to impingement problems. Although she has restrictions for use of her right hand, she continues to work for respondent at the same job, still using her right hand. Claimant has had improvement in her right shoulder since her surgery but continues to have a problem with her right ring finger. Claimant testified that she has back pain in her mid back. Claimant had a previous injury to her neck. But she said the problems she has currently are with her back and not her neck.

Dr. Pedro Murati, a certified independent medical examiner who is board certified in electrodiagnostic medicine and rehabilitation and physical medicine, saw claimant on two occasions, both at the request of claimant's attorney. He first saw claimant on August 17, 2010, while she was undergoing treatment. He saw her again on August 2, 2011. And following supplementation of medical reports, Dr. Murati produced a third medical report dated November 3, 2011.

On August 17, 2010, claimant's chief complaints were burning pain in the right shoulder, trouble lifting, loss of grip strength of the right hand, loss of strength in the right shoulder, third and fifth fingers do not function normally, shaking of the hands, and neck pain. Claimant told Dr. Murati she suffered a series of injuries due to repetitively washing intestines through November 26, 2006. She experienced pain in her right shoulder, right wrist, neck and upper back. Dr. Murati reviewed records of claimant's medical treatment. Dr. Murati diagnosed claimant with status post right ring finger trigger release, status post, unknown right shoulder surgery, status post, unknown right wrist surgery and myofascial pain syndrome affecting the right shoulder girdle extending into the cervical and thoracic paraspinals. Dr. Murati said claimant's diagnoses were within a reasonable medical probability a direct result of the work-related series of repetitive trauma through November 26, 2006. He recommended claimant have physical therapy, cortisone trigger point injections, and pain and anti-inflammatory medications.

Dr. Murati placed the following restrictions on claimant: No lifting, carrying, pushing or pulling above 20 pounds. She could occasionally lift to 20 pounds and frequently lift to 10 pounds. No climbing ladders, no crawling, no repetitive grasping or grabbing with the right hand, no heavy grasping with the right hand, no above shoulder work on the right, no work more than 18 inches from the body on the right, no use of hooks or knives, and no use of vibratory tools. She should avoid awkward positions of the neck. She should only occasionally use repetitive hand controls with the right hand.

Dr. Murati saw claimant a second time on August 2, 2011. She was still employed at respondent cleaning intestines. Since his last examination, claimant had been seen by Dr. Carabetta. Also, claimant had two injections in her right shoulder. Claimant complained of a burning pain in her right shoulder and hand, she had trouble lifting, and she had numbness and tingling in her right hand. Claimant said she had a shocking pain in her whole arm. She had trouble sleeping because of the right shoulder pain.

Dr. Murati's diagnoses remained the same, other than adding a re-do of the right fourth digit finger release. Rather than issue restrictions, Dr. Murati said that claimant was to work as tolerated and use common sense. He continued to believe that claimant's diagnoses were the result of her work-related injury at respondent. Dr. Murati gave claimant a partial impairment rating but said he would complete it upon receipt of the operative reports for the right shoulder surgery and the second trigger finger release surgery.

On November 3, 2011, upon receipt of the additional medical records, Dr. Murati completed his impairment rating opinion. Using the *AMA Guides*,³ Dr. Murati rated claimant as follows:

For the right fourth digit trigger finger release, 10 percent to the right upper extremity, which converts to a 1 percent right hand impairment, which converts to a 1 percent right upper extremity impairment.

For the right carpal tunnel release, 10 percent to the right upper extremity.

For the severe glenohumeral crepitus of the right shoulder, 18 percent to the right upper extremity.

For the right subacromial decompression, 10 percent to the right upper extremity.

For the post distal clavicle excision, 10 percent to the right upper extremity.

The impairments to the right upper extremity combine for a 40 percent right upper extremity impairment, which converts to a 24 percent whole person impairment.

For the myofascial pain syndrome affecting the cervical paraspinals, Dr. Murati placed claimant in Cervicothoracic DRE Category II for a 5 percent whole person impairment. For the myofascial pain syndrome affecting the thoracic paraspinals, he placed claimant in Thoracolumbar DRE Category II for a 5 percent whole person impairment. Claimant's whole person impairments combine for a total 32 percent permanent partial impairment to the whole body.

Dr. Murati testified that claimant has a condition in her neck and in her upper back, and that both are treated separately by the *AMA Guides*. Dr. Murati said he gave claimant a rating for her mid back because he saw findings of a soft tissue injury in the upper back that was related to her current work injury.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Murati said claimant denied any significant previous injuries to her right shoulder, right hand, or neck prior to the work-related injury she sustained on all days worked until November 26, 2006. However, Dr. Murati became aware that claimant had a previous workers compensation claim with a date of accident of September 21, 2004, after his examinations. That claim was resolved by award on March 29, 2007, and claimant was assessed a 5 percent impairment for neck and upper and lower back pain, cervical, lumbar strain and sprain, and myofascial pain affecting her neck and back. Dr. Murati acknowledged that if claimant already received a 5 percent whole person impairment for her neck, she would have no additional impairment to her neck as a result of the current alleged injury.

Dr. Vito Carabetta, who is board certified in physical medicine and rehabilitation, examined claimant on December 10, 2010, at the referral of the ALJ. Claimant's chief complaint was a diffuse pain throughout the entire right upper extremity, continuing up into her neck. She had burning and aching pain in the right ring finger and little finger. She had a fairly sharp pain towards the right elbow region. She said her right shoulder had improved after surgery and only intermittently did she have burning sensation at the right shoulder. Posteriorly in the right shoulder girdle region, continuing up into the neck region, she described a constant, variable aching pain. Claimant told him her symptoms gradually developed over time, and she first complained to respondent of the symptoms on November 27, 2006.

After his examination, Dr. Carabetta diagnosed claimant with post right carpal tunnel release, post right ring finger flexor tendon release, right medial epicondylitis by history, post right shoulder decompressive arthroscopy, and right upper trapezius muscle myofascial pain.

Dr. Carabetta considered claimant's injury to be a soft tissue injury. In his examination, he found evidence of myofascial pain on the right side. He described the pain as being in the right posterior shoulder girdle region continuing up into the neck region. Claimant described constant variable aching pain. The AMA *Guides* table he used in rating included the cervical thoracic region. Dr. Carabetta said that Dr. Murati, in providing a rating for thoracic paraspinous myofascial pain, essentially gave claimant an impairment for her lower back, which was not injured in this case. Dr. Carabetta referenced Table 73, which includes the thoracic region. He intimated that Dr. Murati rated the thoracic area twice.

Dr. Carabetta placed restrictions on claimant that she perform overhead activity only for brief periods of time with negligible weight—under a pound. She should not use her limbs overhead to support any significant weight for more than a few seconds. Firm or repetitive grasping or gripping with the right hand was not advised as it could put claimant at risk for recurrent problems with the hand, wrist and elbow.

After taking a history, reviewing her medical records, and performing a physical examination, Dr. Carabetta rated claimant's impairment, using the *AMA Guides*, as follows:

For the upper trapezius muscle region at the base of the neck, he placed claimant in Category II for a 5 percent whole person impairment.

For a right shoulder arthroscopy, 10 percent impairment of the right upper extremity which converts to a 6 percent impairment to the body as a whole.

For the right elbow region, 1 percent to the right upper extremity, which converts to 1 percent impairment to the whole body.

For right carpal tunnel syndrome, 10 percent of the right upper extremity, which converts to a 6 percent whole person impairment.

For the tendon release of the right ring finger area, a 20 percent impairment of the right ring finger, which is the equivalent of a 2 percent impairment of the right hand. This converts to a 2 percent of the right upper extremity, which is the equivalent of a 1 percent impairment to the whole body.

Dr. Carabetta's ratings combine for an 18 percent whole person impairment.

Dr. Carabetta had no medical records that showed claimant had any type of preexisting conditions. Claimant gave him a history of a prior low-back injury but did not give him a history of a preexisting neck injury. He had no medical records that showed any type of preexisting condition or impairment to the neck. After being told that claimant had previously been rated and compensated for a 5 percent impairment to her cervical region, Dr. Carabetta said it would be fair to say that the impairment to claimant's neck had not increased since her previous accident. If he would deduct the 5 percent to the neck from his rating, claimant would no longer have an impairment to the body as a whole but would be left with a 22 percent impairment of the right upper extremity.

Dr. Carabetta noted in his report that claimant had trouble remembering the details of the majority of her history. He further noted, "[u]nfortunately, relying on the medical records alone was less than ideal, in that important reports such as dates and details of surgical procedures were not contained within the records."⁴ When asked by claimant's attorney whether it would have been important for him to have had the operative reports, Dr. Carabetta stated:

Significantly in this case, no. We do know what she had; I just did not have the reports themselves to be able to entertain the details.

We do know that she underwent a carpal tunnel release procedure and she also had issues with the elbow, if I'm not mistaken, that were dealt with in terms of the medial epicondyle release. And, consequently, knowing that gives me additional information that I can still use to proceed with the rating as I did, but it would have been better if I had the specifics.

. . . .

⁴ Carabetta Depo., Ex. 2 at 4.

If I had the report, it might have diminished the rating somewhat in terms of the carpal tunnel, but I went with the assumption that it was what I assumed it to be in terms of the findings.

The rest of the information contained within the rather extensive records were more than sufficient to fill in the gap to be able to categorize the problem that was present before the surgery.⁵

Dr. Carabetta acknowledged that the *AMA Guides* indicate that it is best to have all medical documentation prior to making a rating or an evaluation. The medical records reviewed by Dr. Carabetta were submitted to him by a joint letter signed by both claimant's attorney and respondent's attorney. If Dr. Carabetta noticed some records were missing, he would not have contacted either attorney because he would have considered that an ex parte conversation. Dr. Carabetta said he did not expect the operative records to alter his opinion significantly. But he would have preferred to have had the full reports there because he would have known with certainty what had been done in the surgery. However, he added there was enough follow-up notes in the chart that he had a 95 percent certainty of what was done in the surgery.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-501(a) states in part:

In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2006 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

⁵ Carabetta Depo. at 8-9.

K.S.A. 44-510a provides:

(a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

(b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.

K.S.A. 44-519 provides:

Except in preliminary hearings conducted under K.S.A. 44-534a and amendments thereto, no report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible.

In *Hanson*,⁶ the Kansas Court of Appeals stated:

The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.

ANALYSIS

Claimant argues that the opinions of Dr. Murati are more credible than those of Dr. Carabetta. In support of this contention, claimant points out that unlike Dr. Carabetta, Dr. Murati examined claimant on more than one occasion. Moreover, Dr. Murati reviewed the reports of the treating physician regarding claimant's shoulder surgery. Dr. Carabetta admitted that it would have been preferable for him to have the surgical report but he nevertheless believed he had sufficient information to rate claimant's shoulder condition using the *AMA Guides*. Dr. Carabetta said he reviewed over 300 pages of medical records regarding claimant. Not all of those records pertained to claimant's right shoulder, and Dr. Carabetta admitted he did not have the operative report, but Dr. Carabetta nevertheless decided that he had sufficient information to give a rating. The Board agrees.

Claimant also argued that "it is possible Dr. Carabetta harbors some unknown bias against the Claimant" and "Dr. Carabetta's medical report . . . may be the work product of a potential bias against the Claimant."⁷ The Board finds no support in the record for this allegation of a potential bias.

Both Dr. Murati and Dr. Carabetta acknowledged that they did not have records concerning any possible preexisting injuries to claimant's right shoulder, neck or back. Nor did they have reports concerning prior impairment ratings. At the regular hearing, respondent offered into evidence the transcript of a March 29, 2007, settlement hearing with attachments that included three medical reports; a February 23, 2005, independent medical examination report by Dr. Paul Stein; a July 28, 2005, independent medical examination report by Dr. George Fluter; and a May 9, 2006, independent medical examination report by Dr. Terrence Pratt. None of those three physicians testified in this case. Claimant did not object to the transcript of the testimony given at the settlement hearing but did object to the medical records and reports "until there's medical testimony discussing the preexisting condition."⁸ The ALJ seemingly overruled the objection at the

⁶ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), rev. denied 270 Kan. 898 (2001); see also *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

⁷ Claimant's Submission Letter to ALJ filed Mar. 16, 2012, at 4.

⁸ R.H. Trans. at 14.

regular hearing, although it is not entirely clear.⁹ At the regular hearing, claimant's attorney and claimant acknowledged she had a prior injury to her neck but clarified her current complaints were to her upper and mid back, not her neck.

Although Dr. Carabetta was advised of a prior rating to claimant's cervicothoracic spine, her current diagnosis is myofascial pain syndrome. No physician testified that claimant had a prior diagnosis of myofascial pain syndrome or that the current neck and upper and mid back conditions constitute or were the result of an aggravation of the prior injury.¹⁰

The Board finds that only the testimony given at the Settlement Hearing is admissible. It shows a settlement based on a 7 percent impairment of function to the body as a whole. It does not disclose what that 7 percent rating was for. There is no mention in the testimony as to what her diagnosis was or what the rating was for, how it was arrived at and whether it was per the 4th edition of the *AMA Guides* as required by statute. As such, the questions and answers respondent put to Drs. Carabetta and Murati about the prior rating reports are without foundation and are not to be considered. Absent that testimony, there is no proof that claimant's current condition is an aggravation of a preexisting condition as contemplated by K.S.A. 2006 Supp. 44-501(c). Likewise, respondent is not entitled to a credit or reduction in compensation under K.S.A. 44-510a because there has been no showing that the prior injury contributed to the disability resulting from the current injuries. In addition, there is no overlapping of compensation, as the weekly benefits for the permanent partial disability awarded in the March 29, 2007, settlement for the September 21, 2004, accidental injury would have been fully paid before the November 26, 2006, accidental injuries in this docketed claim.

The Board agrees with and affirms the ALJ's conclusion that the opinions of the court-ordered IME physician, Dr. Carabetta, are persuasive and should be adopted. The Board disagrees, however, that respondent has proven an entitlement to a credit for preexisting impairment. Accordingly, claimant is entitled to an award of permanent partial disability compensation based upon the full rating given by Dr. Carabetta of 18 percent to the body as a whole. As this claim involves a body as a whole injury, the individual ratings to the upper extremity should be converted to their percentage as an impairment to the whole body, as Dr. Carabetta did.

⁹ The reporter showed Respondent's Exhibit 2 as admitted in the Index of the regular hearing transcript at page 3.

¹⁰ At the regular hearing, claimant testified that she had seen Dr. Pratt again for the injuries that are a part of this claim, but he did not testify and his records are not part of the record in this case.

CONCLUSION

- (1) Claimant has an 18 percent permanent partial disability to the body as a whole.
- (2) Claimant's objection to the medical reports attached to respondent's Exhibit 2 to the regular hearing is sustained.
- (3) The ALJ erred in reducing claimant's award by 5 percent to the body as a whole for the alleged preexisting cervicothoracic spine impairment.

The ALJ approved the fee agreement between claimant and his attorney. However, this file contains no attorney fee agreement between claimant and her current attorney as mandated by K.S.A. 44-536(b). As such, there can be no approval of that fee agreement. Should claimant's counsel desire a fee be approved, he must file and submit the written contract to the Director for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated April 20, 2012, is modified to find that claimant has an 18 percent permanent partial general body disability.

Claimant is entitled to 74.70 weeks of permanent partial disability compensation at the rate of \$372.58 per week or \$27,831.73 for an 18 percent functional disability, making a total award of \$27,831.73.

As of September 14, 2012, there would be due and owing to the claimant 74.70 weeks of permanent partial disability compensation at the rate of \$372.58 per week in the sum of \$27,831.73 for a total due and owing of \$27,831.73, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of September, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
snchzfelix@netscape.net

Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier
smcqueen@sharpmcqueen.com

Pamela J. Fuller, Administrative Law Judge